BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CORLISS ENGLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,001,562
LOCKE SUPPLY COMPANY	)	
Respondent	)	
AND	)	
	)	
TRANSCONTINENTAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the June 26, 2009, review and modification Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on September 25, 2009, in Wichita, Kansas.

APPEARANCES

Phillip B. Slape of Wichita, Kansas, appeared for claimant. D. Steven Marsh of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the review and modification Award. The record also includes the March 28, 2003, settlement hearing transcript and attachments.

ISSUES

This is a review and modification proceeding. On March 28, 2003, the parties settled this claim for an August 5 or 6, 2001,[1] accident and a right arm injury. But claimant reserved her right to seek review and modification. Consequently, she now seeks compensation for an accident on November 22, 2006, when she fell and injured her left

[1] In the record there are references to both August 5, 2001, and August 6, 2001.

leg. Claimant contends the fall was a direct consequence of the right arm injury as she fell due to the medication she was taking for that injury.

In the June 26, 2009, review and modification Award, Judge Barnes found claimant's left leg injury was a direct consequence of her right arm injury. After finding claimant failed to prove she was permanently and totally disabled, the Judge awarded claimant benefits for a 13 percent permanent partial disability to the left leg.

Claimant contends her right arm and left leg injuries have rendered her essentially and realistically unemployable. Accordingly, claimant requests benefits for a permanent total disability.

Conversely, respondent contends claimant has failed to prove she is permanently and totally disabled. Respondent also maintains claimant's complex regional pain disorder (CRPD), also known as reflex sympathetic dystrophy (RSD), in her right arm does not transform this claim into one for a whole person injury. Rather, respondent maintains claimant has two scheduled injuries; namely, a 54 percent impairment to her right wrist (which was settled on March 28, 2003) and a 2 percent impairment to her left knee.

The only issue before the Board on this appeal is the nature and extent of claimant's disability. In the event the Board determines claimant's award should be limited to her functional impairment of the left knee, the parties announced at oral argument before the Board that they do not challenge the Judge's finding that claimant has sustained a 13 percent permanent partial disability to the left leg.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

On March 28, 2003, the parties entered into a settlement agreement in which claimant received compensation for a 54 percent impairment to the right upper extremity at the level of the forearm. The parties agreed the accident date was either August 5 or 6, 2001. Claimant reserved her right to pursue both additional medical treatment and review and modification of her award.

The 54 percent impairment rating was provided by Dr. Paul S. Stein, a board-certified neurological surgeon, who initially saw claimant in November 2002 pursuant to Judge Barnes' order. The doctor diagnosed degenerative changes in claimant's right wrist

and probable CRPD. Using the AMA *Guides*,[2] the doctor rated claimant in January 2003 and restricted her from activities using her right hand. In January 2003, Dr. Stein believed claimant retained the ability to work. And despite releasing her from medical treatment, Dr. Stein recommended that claimant have a doctor to provide her ongoing medications for her CRPD. Consequently, claimant's personal physician, Dr. Scott M. Hane, was authorized to prescribe and monitor the numerous medications prescribed for claimant's right arm injury.

Vertigo is one of the side effects of claimant's medications. On November 22, 2006, claimant fell at home during the night on her way to the bathroom. Claimant maintains she particularly had problems with the medication Neurontin that she was taking for her right arm as it seemed to make her dizzy and affected her ability to walk. And approximately two weeks before her fall, Dr. Hane had increased her Neurontin. Claimant also maintains she has fallen on several other occasions without injuring herself. According to Dr. Hane, drowsiness and poor coordination are side effects of taking Neurontin, and when claimant expressed experiencing lightheadedness at a July 2005 visit with the doctor, it was Dr. Hane's opinion that the cause of that was probably the dose of Neurontin claimant was taking.

Claimant was eventually referred to Dr. John P. Estivo, a board-certified orthopedic surgeon. The doctor agreed that the history he was provided at claimant's first visit with him was consistent with the fact that claimant was taking pain medications for her right arm injury and that those medications caused her to become dizzy, leading to the November 2006 fall.

According to Dr. Estivo, claimant tore her medial meniscus in the November 2006 fall. Dr. Estivo operated on claimant's left knee in August 2007 and performed a left knee arthroscopy, partial medial meniscectomy, chondroplasty to the medial femoral condyle, and chondroplasty of the patella and femoral trochlea. In October 2007, Dr. Estivo rated claimant's left lower extremity under the *Guides* at 2 percent for the partial medial meniscectomy and released her without any restrictions. The doctor saw claimant again in July 2008 for stiffness and swelling in the left knee, which the doctor concluded was consistent with degenerative joint disease that was unrelated to her November 2006 fall.

Claimant left respondent's employment in early January 2002. For a couple of years after leaving respondent's employment, claimant cared for her mother-in-law, who had Alzheimer's disease. Claimant cooked, did her mother-in-law's laundry, and sometimes drove her mother-in-law to pick up her prescriptions and to take her to medical appointments. In 2003 claimant began working for the Cerebral Palsy Research

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Foundation in Winfield, Kansas, where she cooked for residents and helped with their baths. Claimant worked at that job for approximately four months until quitting due to her right arm pain.

When she last testified in late 2008, claimant was living with her husband and 34-year-old daughter on 80 acres near Douglass, Kansas. She was taking six medications; namely, Neurontin, Tramadol, Cymbalta, Meloxicam, Hydrocodone, and Flexeril. In addition, claimant had a TENS unit, which she used several times a day for both her right arm and left knee pain. Nevertheless, she maintains that on good days she is able to do some dusting and some laundry, cook dinner, and wash dishes. Moreover, on some occasions claimant has been able to do some chores such as watering the cows. Conversely, on bad days, especially when it's cold, rainy, or windy, claimant estimates she reclines or lies down all but three hours due to the pain in her arm and knee. Claimant estimates that approximately two years before her November 2008 review and modification hearing, she began receiving Social Security disability benefits due to her right arm injury.

The record contains five doctors' opinions regarding claimant's ability to work. Some are more persuasive than others. Dr. Estivo concluded claimant retained the ability to work. Dr. Estivo last saw claimant in July 2008 but at no time did he ever examine claimant's right arm. Accordingly, he has no opinion regarding the condition of claimant's right arm.[3] Dr. Stein diagnosed probable RSD in claimant's right arm. Nevertheless, Dr. Stein thought claimant was employable when he rated her impairment in January 2003. Dr. Amitabh Goel, who is board-certified in physical medicine and rehabilitation, examined claimant at Dr. Hane's request on one occasion in July 2007 and made findings that were inconsistent with CRPD. Accordingly, Dr. Goel believed claimant was possibly malingering and that she could return to work full-time with no restrictions.[4]

Claimant's attorney hired Dr. Pedro A. Murati, who is board-certified in physical medicine and performs evaluations primarily for claimant attorneys, to evaluate claimant. Dr. Murati examined claimant in both August 2002 and January 2008 and concluded that under the AMA *Guides* claimant had a 54 percent right upper extremity impairment and a 24 percent left lower extremity impairment. Dr. Murati found classic symptoms of CRPD. Although the doctor did not state that claimant was totally disabled in 2002, Dr. Murati now believes claimant is permanently and totally disabled from working because she is unable to use her right arm, she needs chronic pain management, and because of the medications she is taking.[5] The doctor also explained he did not believe claimant was realistically

[3] Estivo Depo. at 21, 22.

[4] Goel Depo. at 18.

[5] Murati Depo. at 33.

employable as she has chronic pain and, therefore, she will likely have a lot of bad days and be unable to work.

Finally, claimant's personal physician Dr. Hane testified in February 2009 that claimant's condition had improved and that she was doing much better over the last year as she was using her arm a lot more and able to use it in household activities that she had not been capable of before. The doctor also testified that claimant had been taking Flexeril, Ultracet, Cymbalta, Lortab, Neurontin, and Meloxicam but that she had complained of increased symptoms in her right arm in January 2009, which she attributed to the cold weather. When commenting on claimant's ability to work, Dr. Hane indicated he thought claimant would be unable to work 40 hours a week at this point and that any work she performed would have to be sedentary. He also indicated that claimant would not be able to perform any manual labor and that she might miss work more often than others. Moreover, Dr. Hane believed claimant would have to commence work on a part-time basis.[6] And although he did not believe claimant's medications would be a problem at this point, he admitted he did not know how her mental acuity might be affected as her medications could potentially affect her ability to function.[7]

Karen Crist Terrill, respondent's vocational expert, testified that without violating the work restrictions provided by Dr. Stein claimant could work as a caretaker, similar to the work she performed for her mother-in-law, or as an employee who issued protective clothing. Ms. Terrill, however, was unable to name one business in the Wichita, Kansas, area that had such a position. On the other hand, claimant's labor market expert, Jerry D. Hardin, indicated that considering claimant's use of pain medications and a TENS unit, as well as the opinions of Dr. Murati, claimant was essentially and realistically unemployable.

The Board finds Dr. Hane is the most knowledgeable about claimant's ability to work. He has treated claimant and seen her on numerous occasions between January 2000 and January 2009, when he testified. Accordingly, the Board finds claimant, who is right-handed, retains the ability to perform, at most, part-time sedentary work.

CONCLUSIONS OF LAW

Claimant has injured an arm and a leg. Therefore, there is a rebuttable presumption that claimant is permanently and totally disabled. In *Pruter*[8] the worker sustained injuries to the right arm and right leg. In that decision, the Kansas Supreme Court held:

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[6] Hane Depo. at 35.

[7] *Id.*, at 36.

[8] *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

> Under the language of K.S.A. 44-510c, controlling case law interpreting the statute, and the presumption of an intent to change the law, we find that by the 1959 amendment to K.S.A. 44-510, the legislature intended that the combined loss of any of the listed members (eye, hand, arm, foot, leg) raises a presumption that the injured worker suffered permanent total disability.
>
> Pruter's combination injuries to her right arm and right leg should have been presumed to constitute a permanent total disability, consistent with the reasoning in *Honn*. . . .[9]

And in *Casco*[10] the Kansas Supreme Court held the following:

> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. But the Kansas Court of Appeals in *Wardlow*[11] held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

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[9] *Id.*, at 875.

[10] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 8, 154 P.3d 494, *reh'g denied* (2007).

[11] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

In *Wardlow*, the injured worker, a former truck driver, was physically impaired and lacked transferrable job skills, making him essentially unemployable as he was rendered capable of performing only part-time sedentary work. The Court in *Wardlow* looked at all the circumstances surrounding Mr. Wardlow's condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether Mr. Wardlow was permanently and totally disabled.

Because claimant has injured an arm and a leg, she is presumed to be permanently and totally disabled from engaging in substantial and gainful employment. This record fails to rebut that presumption. Claimant is presently limited to sedentary work and it is recommended she should first try performing that work on only a part-time basis. This does not constitute substantial, gainful employment. In short, the Board finds claimant at this juncture is essentially and realistically unemployable. In the event her condition improves, the parties may seek review and modification under K.S.A. 44-528.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[12] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the June 26, 2009, review and modification Award entered by Judge Barnes.

Corliss Engle is granted permanent total disability benefits from Locke Supply Company and its insurance carrier. Effective November 22, 2006, based upon an average weekly wage of $347.47, Ms. Engle is entitled to receive 422.66 weeks of permanent total disability benefits at $231.66 per week, or $97,912.43 ($125,000 less $27,087.57 previously paid pursuant to the March 28, 2003, settlement) for a permanent total disability and a total award of $125,000.

As of October 28, 2009, Ms. Engle is entitled to receive 153.14 weeks of permanent total disability compensation at $231.66 per week in the sum of $35,476.41, for a total due and owing of $35,476.41, which is ordered paid in one lump sum. Thereafter, the remaining balance of $62,436.02 shall be paid at $231.66 per week until paid or until further order of the Director.

[12] K.S.A. 2008 Supp. 44-555c(k).

The record does not contain a fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Division for review and approval. Accordingly, under K.S.A. 44-536(b), claimant is only entitled to such fee as is approved.

The Board adopts the remaining orders set forth in the review and modification Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge